



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT
4751 BEST ROAD, SUITE 140
COLLEGE PARK, GEORGIA 30337

CESAS - RDP

7 February 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ SAS-2023-00880²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name of Aquatic Resource	JD or Non-JD	Section 404/Section 10
Perennial Stream 1	JD	Section 404
Perennial Stream 2	JD	Section 404
Intermittent Stream 1	JD	Section 404
Intermittent Stream 3	JD	Section 404
Wetland 1	JD	Section 404
Wetland 2	JD	Section 404
Wetland 3	JD	Section 404
Ephemeral Stream 1	Non-JD	N/A

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximately 100-acre site is located north of Harmony Grove Church Road, southeast of Dabbs Bridge Road, west of Cool Creek Court in Dallas, Paulding County, Georgia (centered at latitude: 34.0551 longitude: -84.7963).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.:

A. Name of nearest downstream TNW, Territorial Sea or interstate water: The nearest Interstate water is the Coosa River which is approximately 25.7 miles to the

northwest.

B. Determination based on: Based on a review of several maps listed in Section 9 of this memorandum, the identified water is shown as an aquatic feature and crossing the interstate boundary of Georgia/Alabama.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS

Stream and/wetlands:

Perennial Stream 1 is a relatively permanent water (RPW) and is an unnamed tributary to Pumpkinvine Creek, an RPW. Pumpkinvine Creek is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Perennial Stream 1 is a tributary to the Coosa River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and the presence of bed and banks.

Perennial Stream 2 is a relatively permanent water (RPW) and is an unnamed tributary to Pumpkinvine Creek, an RPW. Pumpkinvine Creek is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Perennial Stream 2 is a tributary to the Coosa River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and the presence bed and banks.

Intermittent Stream 1 is a relatively permanent water (RPW) and is an unnamed tributary to Pumpkinvine Creek, an RPW. Pumpkinvine Creek is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Intermittent Stream 1 is a tributary to the Coosa River, a navigable water of the United States. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and the presence bed and banks.

Wetland 3 is an abutting wetland to Intermittent Stream 1, an RPW. Intermittent Stream 1 connects to Pumpkinvine Creek which is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Perennial Stream 1 is a tributary to the Coosa River, a navigable water of the United States. The wetland meets the hydrophytic

vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Eastern Mountains and Piedmont Regional Supplement and are contiguous with the unnamed tributary.

Wetland 2 is an abutting wetland to Intermittent Stream 2, an RPW, located outside of the project's boundaries. Intermittent Stream 2 is a tributary to Pumpkinvine Creek which is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Perennial Stream 1 is a tributary to the Coosa River, a navigable water of the United States. The wetland meets the hydrophytic vegetation, wetland hydrology, and hydric soil criteria of the 1987 Corps of Engineers Wetland Delineation Manual and the Eastern Mountains and Piedmont Regional Supplement and are contiguous with the unnamed tributary.

Intermittent Stream 3 is a relatively permanent water (RPW) and a losing stream that travels south through Wetland 1 and reforms before losing form 125 feet from Perennial Stream 2, which is a tributary to Pumpkinvine Creek which is a tributary to the Etowah River, an RPW. The Etowah River flows to the Coosa River, a traditionally navigable water (TNW) and interstate water. The Ordinary High Water Mark (OHWM) of the unnamed tributary was indicated by the following physical characteristics: natural line impressed on the bank, shelving, absence of vegetation, scour, and bed and banks.

6. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁷ N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States

⁶ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁷ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

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in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

- a. TNWs (a)(1): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5):

Name of Aquatic Resource	Size (in acres)	Flow Regime and additional description of the tributary	Method for determining flow regime
Perennial Stream 1	0.13	This is a perennial stream and starts its flow path north of the project area and wraps around it following a southeast pattern before connecting to Pumpkinvine creek to the southeast. Please see attached delineation map for exact location on the property this feature is located.	Review of site photographs provided during normal conditions and NCDWR stream identification form
Perennial Stream 2	0.041	This is a perennial stream and starts its flow path west of the project area and wraps around it following a southeast pattern before connecting to Pumpkinvine creek to the southeast. Please see attached delineation map for exact location on the property this feature is located.	Review of site photographs provided during normal conditions and NCDWR stream identification form
Intermittent Stream 1	0.003	This is an intermittent stream that begins at the bottom of Wetland 3 and travel to the south before connecting to Pumpkinvine Creek. Please see attached delineation map for exact location on the property this feature is located.	Review of site photographs provided during normal conditions and NCDWR stream identification form
Intermittent Stream 3	0.365	This is an intermittent stream that begins within the project area and travel to the south before losing form of bed and bank. Please see attached delineation map for exact location on the property this feature is located.	Review of site photographs provided during normal conditions and NCDWR stream identification form

f. The territorial seas (a)(6): N/a

g. Adjacent wetlands (a)(7):

Name of Aquatic Resource	Size (in acres)	Contiguous with or abutting? If so, list water	Describe continuous surface connection
Wetland 1	0.006	Yes, Intermittent Stream 3	The wetland boundary is connecting and contiguous with intermittent stream 3, an RPW
Wetland 2	0.016	Yes, Intermittent stream 2	The wetland boundary is connecting and contiguous with intermittent stream 3, an RPW
Wetland 3	0.001	Yes, Intermittent Stream 1	The wetland boundary is connecting and contiguous with intermittent stream 3, an RPW

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁸ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A
- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic

⁸ 51 FR 41217, November 13, 1986.

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resource or feature, and how it was determined to be an “isolated water” in accordance with SWANCC. N/A

- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Name of excluded feature	Size (in acres)	Type of resource generally not jurisdictional
Ephemeral Stream 1	0.073	Ephemeral Stream that does not show characteristics of a RPW.

- 9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. 1. Date of Office (desktop review): 1/31/2024 CESAS RD-P
- 2. Date(s) of Field Review (if applicable): [REDACTED] 9/27/2023
- b. Data sources used to support this determination (included in the administrative record).
 - Aquatic Resources delineation submitted by, or on behalf of, the requestor: “Preconstruction Notification Lost Creek South Phases 1, 3, 4” – [REDACTED], dated 10/12/2023
 - Aquatic Resources delineation prepared by the USACE:
 - Wetland field data sheets prepared by the Corps:
 - OHWM data sheets prepared by the USACE:
 - Previous JDs (AJD or PJD) addressing the same (or portions of the same) review area: ORM Numbers and Dates
 - Photographs: [REDACTED] taken on 9/27/2023.
 - Aerial Imagery:
 - LIDAR: National Regulatory Viewer, SAS-2023-00880, 1/31/2024 CESAS-RDP
 - USDA NRCS Soil Survey: USDA Soils Survey, prepared 10/12/2023
 - USFWS NWI maps:
 - USGS topographic maps: CESAS-RDP SAS-2023-00880 Topo 2/7/2024
 - USGS NHD data/maps:
 - Section 10 resources used:

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- NCDWR stream identification forms Prepared by [REDACTED], dated 9/27/2023
- Antecedent Precipitation Tool Analysis: List Date(s) 9/27/2023 – H2O balance – Dry Season – Normal Conditions
- Other sources of Information: List

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Note: Features were drawn from GPS data overlaid into Google Earth and the resulting locations are approximate.



AERIAL PHOTO W/ AQUATIC RESOURCE LOCATIONS

**PRECONSTRUCTION NOTIFICATION
LOST CREEK SOUTH PHASES 1, 3, & 4
PAULDING COUNTY, GEORGIA**

APPLICANT: [REDACTED]
ENGINEER: [REDACTED]

WETLAND (a)(4)	
STREAM (a)(3)	
APPROX. STUDY AREA	

MAPSOURCE: GOOGLE IMAGE 11/17/2022